



Appeal Decisions

by **K R Saward Solicitor**

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 11 April 2019

Appeal A: FPS/M1900/14A/9

Appeal B: FPS/M1900/14A/10

- The appeals are made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Hertfordshire County Council ('the Council') not to make an Order under Section 53 of that Act.
- The application in Appeal A is dated 27 April 1995.
- The application in Appeal B is dated 9 August 1995.
- Both applications were refused by the Council on 31 August 2018.
- The appellants claim that the definitive map and statement for the area should be modified by adding Finch Lane, from Aldenham Road in a south easterly direction to the junction with Homefield Road, as a byway open to all traffic.

Summary of Decisions: The appeals are allowed

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine these appeals under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ('the 1981 Act'). I have not visited the site, but I am satisfied that I can make my decision without doing so.
2. Both applications relate to the same route. Appeal A was submitted by Dr P D Wadey on behalf of The British Horse Society. Appeal B was submitted a short time after by Mr C Beney on behalf of The Bushey and District Footpaths Association. The Council considered the applications together and prepared a single investigation report and reasoned decision document. Likewise, I shall deal with the appeals together and differentiate between them if appropriate.
3. A copy of a map prepared by the Council showing the claimed route is attached for reference purposes.
4. I have utilised the description of the claimed route as it appears in the Council's decision whilst noting that it is described in both the original applications as "the byway open to all traffic from Aldenham Road (the B462) to the part of Finch Lane which is not subject to vehicular restrictions".

Background

5. Section 53(3)(c)(i) provides that an order to modify the definitive map and statement ('DMS') shall be made where evidence is discovered which (when considered with other relevant evidence available) shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

6. As set out in the case of *R v Secretary of State ex parte Norton and Bagshaw*¹ an Order to add a route should be made if either of two tests is met:

A: does a right of way subsist on the balance of probabilities?

B: is it reasonable to allege that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

7. The route in question is the northernmost part of Finch Lane. It is claimed as a byway open to all traffic ('BOAT'). Aside from representations from the two applicants in favour of a modification order, the Trail Riders Fellowship ('TRF') has submitted a representation opposing the recording of the route as a BOAT.
8. It is undisputed that historically the way is a road utilised by the public for all classes of traffic.
9. A Traffic Regulation Order² ('TRO') was made on 9 October 1973 to prohibit the public use of motor vehicles along the claimed route. It remains in force. The Road Traffic Regulation Act 1967 enabled a TRO to be made in respect of a 'road', defined as any highway and other road to which the public has access.
10. It is further accepted by the Council that a route can be properly listed on both the List of Streets and the DMS. The TRF queries whether Parliament intended that a route could be recorded in both places but acknowledges that there is nothing in law to prevent it.

Main Issue

11. In light of the background, the main issue is whether it is reasonably alleged that the way meets the description of a BOAT and whether there is anything to prevent the way being recorded on the DMS.

Reasons

12. In the first instance, section 53(3)(c) requires there to be a "discovery" of evidence by the Council. In the legal advice for the TRF it is questioned whether there has been a discovery of evidence when there has been a long and well documented history to this route.
13. Dr Wadey produces the judgment in *Roxlena Limited v Cumbria CC and Lamb 2017*³ in which the discovery of evidence was found to include the submission of user evidence forms. There is very little user evidence in this case, but the applications raise new issues on the status of the route which can in my view be taken as the discovery of evidence. There is nothing to indicate that the Council considered the possibility that the route has the status of a BOAT prior to the submission of these applications. Furthermore, there will have been a change in the manner of use of the route triggered after the implementation of the TRO when vehicular traffic became restricted.
14. Section 32 of the Highways Act 1980 ('the 1980 Act') requires a court or other tribunal to take into consideration any map, plan or history of the locality or

¹ [1994] 68 P & CR 402

² The Bushey (Finch Lane)(Prohibition of Driving) Order 1973

³ [2017] EWHC 2651 (Admin)

other relevant document which is tendered in evidence, giving it such weight as is justified by the circumstances. Among the historic maps, the Inland Revenue Map (prepared under the Finance Act 1910) shows the route uncoloured⁴ which the Council acknowledges provides strong evidence that the route was considered as a public road at the time the map was drawn up. I do not go on to analyse other archival documents which are mentioned given the consensus on the historical public use of the route as a road.

15. The point in issue is whether the road is a "byway open to all traffic" meaning "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used" (section 66 of the 1981 Act).
16. Section 67(1) of the Natural Environment and Rural Communities Act 2006 ('the 2006 Act') extinguished public rights of way for mechanically propelled vehicles ('MPV's'), subject to certain exceptions. It essentially prevents the addition of more BOAT's after the cut-off date prescribed in the Act unless an exception applies.
17. An exception under section 67(2)(b) is where the way was not shown in the DMS but was shown in a list required to be kept under section 36(6) of the Highways Act 1980, being a list of highways maintainable at public expense. The List of Streets serves that purpose and so the claimed route is not prevented from being added to the DMS as a BOAT by virtue of the 2006 Act.
18. As a TRO could have been made for a private road, the Council considers that the Order is not evidence of public highway status. Nevertheless, it accepts that highway maintenance records confirm that the route "has been recorded as a publicly maintainable vehicular highway" since 1898 to the present day. Indeed, it is on the List of Streets dating from 1967.
19. The effect of the TRO is to suspend public vehicular rights over the way for MPVs. It provides evidence that the public must have been using the route with vehicles. The current use will be confined to that as a public footpath and bridleway. As the Council acknowledges, a TRO is not permanent. It could be revoked, and vehicular rights allowed to resume.
20. Thus, there is a recognised highway over which the public have a right of way for vehicular and all other kinds of traffic, the vehicular right being merely suspended. Public vehicular rights cannot currently be exercised by virtue of the TRO. As such the main current public use must be for the purposes of a footpath and bridleway.
21. The Council and TRF refer me to case law including the judgments in *Masters v SSETR*⁵. In the High Court, Justice Hooper concluded that the intention behind defining the word "byway" in section 66(1) of the 1981 Act in the way that it is defined is to distinguish byways from ordinary roads. The definition should be construed in a purposive manner. The definition is referring to a type of highway and not seeking to limit byways to those that are currently and actually used by the public for the purpose for which footpaths and bridleways are so used.

⁴ The southernmost end is not shown on the map sheet produced.

⁵ [2000] 2 All ER 788, (CA) [2000] EWCA Civ 249, (CA) [2000] 4 All ER 458, (CS)[2001] QB 151

22. The Court of Appeal confirmed that the test for a carriageway to be recorded on the DMS as a BOAT relates to its character or type. In particular, Parliament did not intend that highways over which the public have rights for vehicular and other types of traffic should be omitted from definitive maps and statements because they had fallen into disuse [or] if their character made them more likely to be used by walkers and horse riders than vehicular traffic because they were more suitable for such use.
23. It is uncontested that there is current pedestrian and bridleway use. There is no established principle that I can see from the authorities which requires the vehicular use to be current.
24. The Council calculates the route to be about 650m long. Its width is restricted at the northern end by a combination of wooden fencing, a gas governor station and a metal post. Gaps on either side of the post allow pedestrian, cycle and equestrian access. A sign erected at this end indicates it is a segregated pedal cycle and pedestrian route. Another sign points south east along the route which reads "Finch Lane Public Way on Foot Horse & bicycle Homefield Road ½".
25. The claimed route is identified as metalled throughout its length, but the metalled width varies between approximately 3-5m with vegetation either side along parts. Dr Wadey describes the old road as lower down than the walking route and separated by several metres of overgrowth, trees and shrubs. There are street lights along the route.
26. With the TRO in place and the route no longer in a condition suitable for vehicular traffic given the various obstructions, there is cause to say that the claimed route does not have the character of an ordinary road where MPV's can pass over the width of the carriageway.
27. The Council submits that the TRO does not change the underlying highway status of the route. If the TRO was rescinded, then the route would return to its former balance of user as a part of the ordinary road network.
28. That is uncontroversial, but the fact remains that the TRO is still in place and it has brought changes in the characteristics of the route. The TRO does not prevent it having the status of a BOAT.
29. In the legal advice for the TRF it is suggested that the Council is unlikely to have power to make a modification order in this case. It is asserted that it must be accepted that at the time of the making the TRO the Council did not consider the route to be suitable for recording as a BOAT. To support this stance reliance is placed on applying the 'presumption of regularity' as discussed in *Calder Gravel Ltd v Kirklees Metropolitan Borough Council*⁶.
30. In *Calder*, the presumption was described as when there has been a long-term enjoyment of a right which can only have come into existence by virtue of a grant or some other legal act, then the law presumes, in the absence of proof to the contrary, that there was a lawful origin. The same presumption of regularity can arise where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved. The presumption is that the statutory authority has acted lawfully and in accordance with its duty.

⁶ [1989] 60 PCR 322

31. In this case, the Council may have presumed that the route is a public road having managed it as such for many years, but I do not see that as fatal to the applications. To my mind, all that can be deduced from the TRO is that the Council accepted that public vehicular traffic was using the road prior to the making of the TRO in 1973. That is not in dispute. If anything, it reinforces that public rights with MPV's were being exercised.
32. There is no evidence before me that the status of the route as a BOAT was ever contemplated before the TRO was made for that possibility to have been dismissed already.
33. The TRF says that the route cannot be dedicated twice, but there is no suggestion that it would be. The application is for a new addition to the DMS. In any event, the List of Streets does not provide a legal record of public rights of way. The only document to do so is the DMS.
34. The Council submits that the highway's route, width and other relevant details are clearly mapped and set out in documentary evidence. It adds that the rights of the public over the route are entirely clear and ascertainable. Moreover, the highway is also maintainable at public expense with regular checks and maintenance undertaken. The application route is not liable to become "lost". For those reasons the Council rejects the notion that there are public benefit imperatives to recording the route on the DMS.
35. Irrespective of any of those matters, the Council has a statutory duty under section 53(2) of the 1981 Act to keep the DMS under continuous review. In the TRF's legal advice it is suggested that the Council has a discretion within section 53(2) whether to make an order. The argument arises from the words "by order make such modifications to the map and statement *as appear to them to be requisite* in consequence of the occurrence of that event."
36. I do not read the section in the same way. Use of the word "shall" at the start of section 53(2) means that the Council is obliged to make an order where satisfied that a legal event has occurred. The need for an order is irrelevant.
37. Recording the route on the DMS would not essentially remove the Council's power to rescind the TRO as it fears. The Council also suggests that vehicular use might tilt the balance of the type of use outside the scope of a BOAT. That is merely speculative. In any event, *Masters* confirms that there is no precondition for there to be equestrian or pedestrian use or that such use is greater than vehicular use in order for a carriageway to be a BOAT.
38. These and other concerns over the possible implications of a modification order do not give reason to decline to make an order if the definition of a BOAT and the tests within section 53 are otherwise met.
39. At this stage for a modification order to be made I simply need to be satisfied that a BOAT is reasonably alleged to subsist. It is a lesser test than required to confirm an order. On the bare facts as presented, a case has been made to reasonably allege that the definition of a BOAT is fulfilled. I am not persuaded that the listing and treatment of the route as publicly maintainable highway gives grounds for the Council to decline to make a modification order. I shall direct that an order be made accordingly. That is not to say that upon further examination of the evidence such an order would be confirmed.
40. In this eventuality, the Council seeks direction as to the width that should be

recorded. The full width of the highway should be included within the Order. What that measurement is must be a matter for determination by the Council.

Conclusion

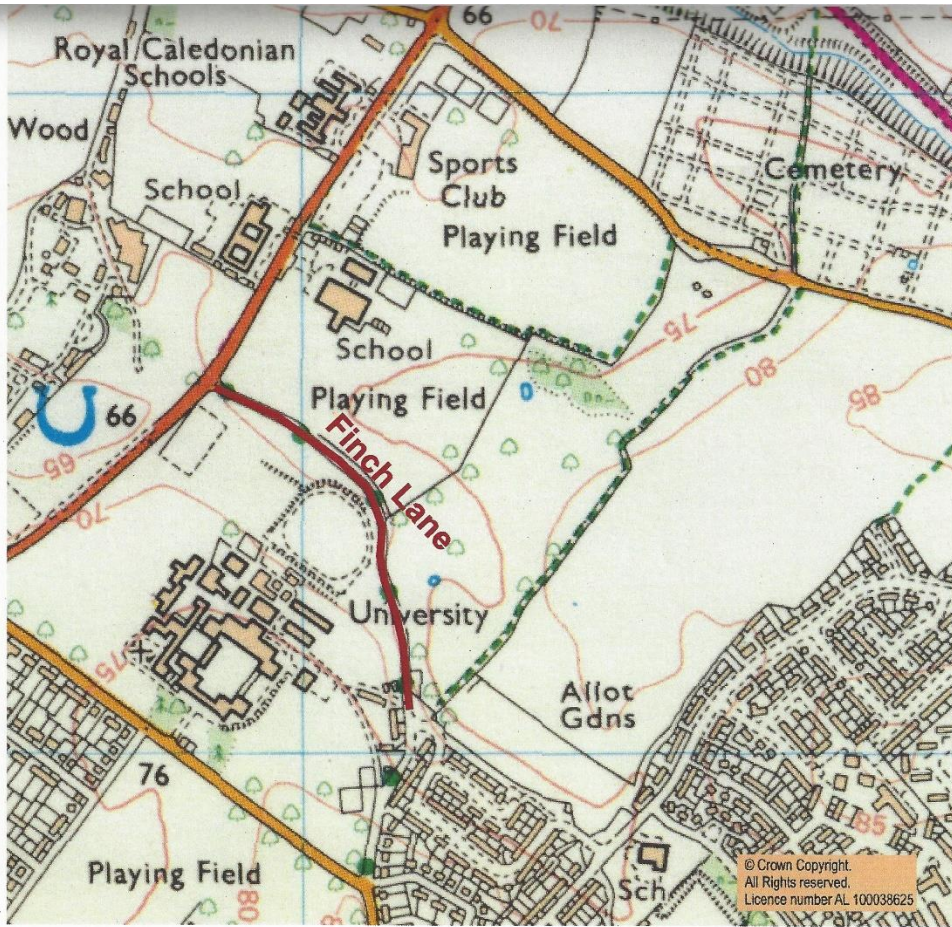
41. Having regard to the above and all other matters raised in the written representations, I conclude that the evidence available does show that on the balance of probabilities it is reasonably alleged that a public right of way subsists as a BOAT.

Formal Decisions

42. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act, Hertfordshire County Council is directed to make an order under section 53(2) and Schedule 15 of the 1981 Act to modify the definitive map and statement to add a byway open to all traffic as set out in the applications dated 27 April 1995 and 9 August 1995. These decisions are made without prejudice to any decisions that may be given by the Secretary of State in accordance with powers under Schedule 15 of the 1981 Act.

KR Seward

INSPECTOR



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